Appendix A

United States District Court
For The Southern District Of Illinois

WENDELL NANCE, SR., Petitioner/Defendant,	)	
	)	No. 2002-cv-4117-JPG
v.	)	
UNITED STATES OF AMERICA Respondent/Plaintiff.	)	

ORDER

GILBERT, District Judge:

This matter comes before the Court on Petitioner's 28 U.S.C. § 2255 motion for modification or correction of sentence. (Doc. 1). The Government responded (Doc. 5) and Petitioner has replied. (Doc. 6). For the reasons discussed below, the petition will be DENIED.

DISCUSSION

The Court assumes that the parties are familiar with the underlying facts of this case; only those portions relevant to the disposition of this petition will therefore be recounted. On direct appeal, the Seventh Circuit rejected Petitioner's claim (as not constituting plain error) that the failure to regard the quantity of drugs involved in his crime as an element of the offense (*see Apprendi v. New Jersey*, 530 U.S. 466 (2000)) required invalidation of the resulting sentence enhancement imposed by this Court. *United States v. Nance*, 236 F.3d 820 (7th Cir. 2000). To be sure, the Circuit Court concluded that one of the facts extending Petitioner's

sentence beyond the normal guidelines range-relevant conduct in excess of 5 grams of crack cocaine-"should [have] be[en] regarded as an element of the offense []and hence as something . . . charged in the indictment, submitted to the jury, and proven by the government beyond a reasonable doubt." *Nance*, 236 F.3d at 823. Petitioner's small victory was short-lived, however. The Circuit Court found that "there [wa]s simply no way on this record that [a jury] could have failed to find that [Petitioner] was conspiring to distribute 5 grams or more of crack cocaine" and denied his claim. *Nance*, 236 F.3d at 826. Three sources of evidence supported that conclusion, any one of which "standing alone would have done the job." *Nance*, 236 F.3d at 826. But in the course of its discussion, the Circuit Court wrote something that planted the seeds for the instant petition. While discussing counsel's failure to object at trial to the *Apprendi*-type issue, the Circuit Court expressed its belief that a "responsible lawyer" would have preserved the issue by making the objection. *Nance*, 236 F.3d at 824 (emphasis added). By offering that opinion under the circumstances presented there-i.e., in a situation where trial counsel had not objected-the Circuit Court sent Petitioner the unequivocal message that his counsel had acted "irresponsibility." By way of 28 U.S.C. § 2255, Petitioner now asks this Court to equate "irresponsible" with "ineffective" and find that he was denied his right to the effective assistance of counsel.

> The Seventh Circuit has spoken clearly regarding Mr. Nance's circumstances, squarely blaming Mr. Nance's former counsel for failing to preserve the *Apprendi*-related issues before this court . . .
>
> It is clear from the opinion of the Court of Appeals that counsel should have raised the issue of Mr. Nance's applicable

> maximum sentence, if not by anticipating any change in the law under *Apprendi*, then under the law as it then existed under Jones; counsel was obviously not 'a responsible lawyer' when he failed to raise this issue. . . . Mr. Nance's claim thus satisfies the first prong under *Strickland [v. Washington*, 466 U.S. 668 (1984)].

(Doc. 2 at 7).

Resolution of this petition is neither close nor difficult. For one thing, the Sixth Amendment standard for the effective assistance of counsel is well-settled:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. In terms of the first prong, *Strickland* explained that "the proper standard for attorney performance is that of reasonableness." *Strickland*, 466 U.S. at 687. Therein lies Petitioner's first error; being "wrong" is much different than being "unreasonable." In order words, to say that a judgment was in "error" is to suggest that it was "erroneous" or "incorrect." But to label a judgment "unreasonable" is to go one step further and conclude that it

was "objectively unreasonable." *Cf. Lockyer v. Andrade*, 538 U.S. ___ (2002).

In this case, the most one could squeeze from the Seventh Circuit's opinion is that counsel committed a "plain" or "obvious" error, not that his performance was constitutionally deficient or "unreasonable." In suggesting that Petitioner's lawyer was less-than-responsible for not objecting, the Circuit Court cited *Jones v. United States*, 526 U.S. 227 (1999), where the Supreme Court held that "the federal carjacking statute [] created three separate offenses, not just three sentencing levels for one offense, depending on the harm that the offender inflicted during the course of the crime." *Nance*, 236 F.3d at 823. (Significantly, the first such claim to reach the Seventh Circuit was presented in *United States v. Smith*, 223 F.3d 554 (7th Cir. 2000)-a case decided one year *after* trial in this case began). Apparently, however, the Circuit Court believed that a "responsible" lawyer would have seen the connection between *Jones*-a case decided a mere five weeks before Petitioner's trial began-and U.S.S.G. § 1B1.3's sentencing enhancement based on drug quantity. In an intuitive sense, five weeks would appear to be precious little time to expect a run-of-the-mill defense attorney to digest a United States Supreme Court case to the extent necessary to recognize its long-range implications; this feeling grows even stronger when Circuit precedent at the time was going in precisely the opposite direction. To that end, *Nance* conceded that *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997), had rejected the claim that "the type of drug [defendants were charged with under 21 U.S.C. § 841] was an element of the offense that had to be proven to the jury beyond a reasonable doubt." *Nance*, 236 F.3d at 823. Perhaps this explains why the Seventh Circuit has since summarily rejected ineffective-assistance-of-counsel claims based on the failure to raise *Apprendi*-type objections (like

the one presented here), characterizing them as "untenable." *United States v. Smith*, 241 F.3d 546, 548 (7th Cir. 2001); *Valenzuela v. United States*, 261 F.3d 694, 700 (7th Cir. 2001). The other Circuit Courts to address this issue are in accord with this position, moreover. *See Brown v. United States*, 311 F.3d 875 (8th Cir. 2002); *United States v. Maass*, No. 01-1068, 2002 WL 1722050 (10th Cir. July 25, 2002), *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001). Therefore, Petitioner failed to establish *Strickland's* threshold requirement that trial counsel's performance was objectively unreasonable.

Even aside from this problem, Petitioner's claim would still fail for yet another reason. In addition to the deficient-performance requirement, a "defendant must show that there [wa]s a reasonable probability that, but for counsel's unprofessional errors, the result of a proceeding would have been different." *Strickland*, 466 U.S. at 693. "[O]nce [the Seventh Circuit] has decided the merits of a ground of appeal, that decision establishes the law of the case and is binding on a district judge asked to decide the same issue in a later phase of the same case, unless there is some good reason for reexamining it." *United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986). On direct appeal, the Seventh Circuit concluded that no jury "could have failed to find that [Petitioner] was conspiring to distribute 5 grams or more of crack cocaine." *Nance*, 236 F.3d at 826. It reached this conclusion, of course, based upon its own independent review of the record; and nothing has been offered that would permit this Court to find the "good cause" necessary to reexamine it. *Nance*, 236 F.3d at 826. Therefore, because the Circuit Court concluded that no jury could have failed to find beyond a reasonable doubt that Petitioner's relevant conduct was in excess of 5 grams, there is no "reasonable

probability" that the result of his sentencing proceeding would have been different.[1]

CONCLUSION

Petitioner's 28 U.S.C. § 2255 petition for a modification or correction of sentence (Doc. 1) is **DENIED**.

IT IS SO ORDERED.

Dated: January 26, 2004

/s/ J. Phil Gilbert
J. PHIL GILBERT
U.S. District Judge

---

[1] Petitioner cited *Glover v. United States*, 531 U.S. 198 (2001), for the proposition that "any lost opportunity for a reduced sentence constitutes prejudice under the *Strickland* standard, as any amount of jail time has Sixth Amendment significance." (Doc. 2 at 3). *Glover*, however, addressed a different question; it was premised on the existence of a reasonable probability that the result of the proceeding would have been different. (In that case it was more like a legal certainty-both sides conceded the fact that technically prejudicial legal error existed.) Such a probability doesn't exist here. As explained in the text, the Seventh Circuit has concluded that no jury could have failed to find beyond a reasonable doubt that Petitioner's relevant conduct exceeded 5 grams.

Appendix B

United States District Court
For The Southern District Of Illinois

WENDELL NANCE, SR., Petitioner/Defendant,	)	
v.	)	No. 2002-cv-4117-JPG
UNITED STATES OF AMERICA Respondent/Plaintiff.	)	

ORDER

GILBERT, District Judge:

This matter comes before the Court on two motions: (1) a 28 U.S.C. § 2253 motion for a certificate of appealability (Doc. 9), and (2) a 28 U.S.C. § 1915 motion to proceed in forma pauperis on appeal. (Doc. 10). To establish an entitlement to the former, one must demonstrate a "substantial denial of a constitutional right" such that the issue is "debatable among jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322 (2003). That showing cannot be made here; both of the issues raised by Petitioner's 28 U.S.C. § 2255 petition were squarely dictated by Circuit precedent. The certificate of appealability will therefore be DENIED. Second, among the items required for a court to evaluate whether to grant permission to proceed in forma pauperis on appeal is a statement of the issues he intends to present. Fed. R. App. P. 24(a)(1)(C). Because Petitioner did not present such a statement with his motion, it, too, must be DENIED.

CONCLUSION

Petitioner's motion for a certificate of appealability (Doc. 9) is **DENIED**. Petitioner's motion to proceed in forma pauperis on appeal (Doc. 10) is also **DENIED**.

IT IS SO ORDERED.

Dated: February 26, 2004

/s/ J. Philip Gilbert
J. PHIL GILBERT
U.S. District Judge

Appendix C

United States District Court
For The Southern District Of Illinois

WENDELL NANCE, SR., Petitioner/Defendant,	)	
	)	No. 2002-cv-4117-JPG
v.	)	
UNITED STATES OF AMERICA Respondent/Plaintiff.	)	

JUDGMENT IN A CIVIL CASE

Decision by Court. This matter having come before the Court on Petitioner's 28 U.S.C. 2255 Petition for modification or correction of sentence, and the Court having rendered its decision,

IT IS ORDERED AND ADJUDGED that Petitioner's 28 U.S.C. § 2255 Petition, in this case, is hereby **DENIED**.

DATE: January 26, 2004.

NORBERT G. JAWORSKI, CLERK

s/Judith Prock
Deputy Clerk

APPROVED: /s/ J Phil Gilbert
J. PHIL GILBERT
U.S. District Judge

Appendix D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 18, 2004
Decided June 22, 2004

Before

HON. JOHN L. COFFEY, *Circuit Judge*
HON. MICHAEL S. KANNE, *Circuit Judge*

No. 04-1567

WENDELL NANCE, SR.,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois.

No. 02 C 4117

J. Phil Gilbert, Judge

ORDER

Wendell Nance has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

Appendix E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 22, 2004

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 04-1567

WENDELL NANCE, SR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA
Respondent-Appellee.

On Petition for Rehearing and Rehearing En Banc.

ORDER

Upon consideration of the **PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC**, filed on July 9, 2004, by petitioner-appellant,

IT IS ORDERED that the petition for rehearing is **GRANTED**.

IT IS FURTHER ORDERED that the court **GRANTS** Nance a certificate of appealability on the issue of

whether his sentence is unconstitutional under *Blakely v. Washington*, 124 S. Ct. 2531 (2004). The parties are invited to address an antecedent procedural issues - for example, whether law of the case may bar consideration of this claim or whether Nance has procedurally defaulted the claim.

IT IS FINALLY ORDERED that the court sua sponte appoints counsel to represent Nance on appeal. A separate order will follow naming counsel and setting a schedule for briefing.

Appendix F

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 18, 2004

Before
Hon. DIANE P. WOOD, Circuit Judge

No. 04-1567

WENDELL NANCE, SR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois.

No. 02 C 4117

J. Phil Gilbert, Judge.

ORDER

Upon consideration of the MOTION TO AMEND BRIEFING SCHEDULE, filed on November 12, 2004, by counsel for the appellant,

IT IS ORDERED that the motion is GRANTED. Proceedings in this case are STAYED pending the Supreme Court decision in *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105. The parties shall file statements of position within 14 days after the Supreme Court opinion issues.

Appendix G

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 3, 2005
Decided February 8, 2005

Before

Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*
Hon. DIANE S. SYKES, *Circuit Judge*

WENDELL NANCE, SR., Petitioner-Appellant,	]	Appeal from the United States District Court for the Southern District of Illinois.
No. 04-1567 v.	]	
UNITED STATES OF AMERICA Respondent-Appellee.	]	No. 02 C 4117
	]	J. Phil Gilbert, Judge

ORDER

In light of this court's opinion in *McReynolds v. United States*, 2005 WL 237642 (7th Cir. Feb. 2, 2005), we VACATE the certificate of appealability and AFFIRM the district court judgment denying Nance's motion to vacate, 28 U.S.C. § 2255.

Appendix H

Constitutional Provisions Involved

U.S. Const. amend. VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.